

**Matter of Elm Sea Realty Corp. v Nassau County
Dept. of Consumer Affairs**

2009 NY Slip Op 31262(U)

June 1, 2009

Supreme Court, Nassau County

Docket Number: 020298/2008

Judge: Ira B. Warshawsky

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SHORT FORM ORDER

**SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. IRA B. WARSHAWSKY,
Justice,**

TRIAL/IAS PART 9

In the Matter of the Application of
ELM SEA REALTY CORP.,

Petitioner,

INDEX NO.: 020298/2008
MOTION DATE: 03/25/2009
MOTION SEQUENCE: 001 and 002

For a Judgment under Article 78 of the Civil
Practice Law and Rules Vacating a Determination
by the Nassau County Department of Consumer
Affairs that it was Operating as an Unlicensed Home
Improvement Contractor and assessing a fine

- against -

THE NASSAU COUNTY DEPARTMENT OF
CONSUMER AFFAIRS,

Respondent.

The following papers read on this motion:

Notice of Petition, Petition and Attorney's Affirmation & Exhibits Annexed	1
Notice of Motion, Affirmation & Exhibits Annexed	2
Memorandum of Law in Support of Motion to Dismiss	3
Affirmation of Francis X. Schroeder in Opposition & Exhibits Annexed	4
Affirmation in Further Opposition of Francis X. Schroeder	5
Reply Memorandum of Law in Further Support of Motion to Dismiss	6

PRELIMINARY STATEMENT

This matter has been transferred to this Court by Order of Hon. William R. LaMarca dated March 17, 2009. The basis for the transfer is the pendency of a related matter entitled *Elm Street Realty Corp. v. Emily Chicoy, Christopher Chicoy and Matthew A. Tedone, Esq., as Escrowee*, under Index No. 008946/08. The current motion by Petitioner is to vacate a determination of the Nassau County Department of Consumer Affairs (DCA) to the effect that Elm Sea Realty Corp. was an unlicensed home improvement contractor in violation of the Nassau County Administrative Code. The Cross-motion, denominated a motion by the Respondent, is to confirm the determination of the DCA.

BACKGROUND

The related action is by Elm Sea to recover \$90,000 held in escrow after the transfer of title to a single family residence from North Sea to the Chicoy's. The \$90,000 included \$65,000 which was due to Elm Sea on receipt of a Certificate of Completion, and \$25,000 for work to be completed after the transfer of title. This Court has previously awarded Elm Sea a judgment in the amount of \$65,000. The Chicoy's filed a complaint with the DCA that Elm Sea was not entitled to payment because they were operating as an unlicensed home improvement contractor in violation of Local Law 6-1970, § 21-11.2.¹ The parties appeared for a hearing before Ratna Bhalla, Hearing Officer, on June 19, 2008², and a determination was rendered on June 22, 2008. It found Elm Sea in violation of the ordinance and fined them \$500.³

Elm Sea appealed and a final determination was rendered on July 9, 2008.⁴ The Commissioner of the Office of Consumer Affairs rejected the arguments of Elm Sea that the work performed on the residence after the closing was in accordance with a contract of sale in which Elm Sea, as owner, agreed to perform work on the premises prior to closing. The Commissioner distinguished between the work done before the transfer of title, when Elm Sea was arranging for

¹ Exh. "A" to Respondent's Motion.

² Transcript annexed as Exh."B" to Respondent's Motion.

³ Exh. "F" to Respondent's Motion.

⁴ Exh. "E" to Petition.

work on its own home, and work done in accordance with a “punch list”.⁵ The Respondent concluded that the change order was a contract for home improvement for which a license was required.

DISCUSSION

The Court concludes that the determination by the Respondent that the “Punch List” constituted a separate and distinct home improvement contract requiring a license for performance, is unreasonable. The determination is vacated and the fine in the amount of \$500 is set aside.

There is no controversy but that the work done by Elm Sea on the home to which it took title on September 1, 2006⁶ did not require a home improvement license. The work was done in accordance with necessary permits and was approved by issuance of certificates of completion. The Grantor in the deed to Elm Sea was James Dorane, a principal of Elm Sea. This work was done in accordance with a February 1, 2007 contract of sale by Elm Sea to the Chicoys.⁷ It was done at the time that the home was owned by Elm Sea, which did not require a license to contract with others for work done on its own premises.

When the closing between Elm Sea and the Chicoys occurred on August 14, 2007, the sum of \$65,000 was placed in escrow pending receipt of certificates of completion from the Town of North Hempstead. Despite production of the documents in January 2007, the Chicoys refused to consent to the release of the funds. Elm Sea was required to bring an action in this Court, as a result of which they were awarded judgment against the Chicoys for release of the funds.

The Chicoys also presented a “punch list” at the closing, which, according to the transcript of the hearing, contained some 72 or 73 items. At the Chicoy’s insistence, Elm Sea agreed to arrange for the completion of these items, all in accordance with the original contract of sale. The classification of this punch list as a contract for home improvement is not reasonable. It is part and parcel of the original agreement by which the Seller/Owner of the premises agreed to perform

⁵ Exh. “C” to Petition.

⁶ Deed to Elm Sea contained in Exh. “C” to motion.

⁷ P/o Exh. “C” to Motion.

certain work prior to closing. The fact that the Chicoys sought to have the follow-up work done by Elm Sea rather than make an adjustment at the closing, is quite remarkable in the light of the “shoddy and unprofessional work done by Elm Sea Realty Corp. . . .” of which they complained.⁸ The inescapable conclusion is that the Chicoys have taken every opportunity to avoid paying for the work done on the home which they were purchasing.

The Nassau County Administrative Code sets forth the requirements with respect to home improvement licensing. The first consideration is the legislative purpose, which is stated as follows:

Legislative purpose. It is the purpose of the Board of Supervisors in enacting this Local Law to safeguard and protect the homeowner against abuses on the part of home improvement contractors by regulating the home improvement, remodeling and repair business and by licensing of persons engaged in such business.
(§ 21.11.0 amended by Local Law No. 21984, in effect January 4, 1984.)

It is significant to note that when the contract of sale, which provided for the renovations, was executed, Elm Sea, not the Chicoys, was the owner of the home. The local law under which the violation was issued was not intended to protect purchasers, but rather owners of one, two and three-family homes. The Chicoys were not owners. They were purchasers who contracted with an owner to purchase a one-family home upon which certain renovations were to be performed before they accepted title.

A home improvement contract is defined in the ordinance as follows:

4. "Home improvement contract" means an agreement between a contractor and an owner for the performance of a home improvement, and includes all labor, services and materials to be furnished and performed thereunder.

At the time of the agreement by which Elm Sea agreed to perform work on the home, it, not the Chicoys was the owner. Thus, the complainant was not a protected person under the express terms of the ordinance.

The determination by the Hearing Officer required a conclusion that Elm Sea was operating as a home improvement contractor. The hearing consisted of the presentation of a

⁸ Exh. “A” to Motion.

punch list, which the Hearing Officer classified as a home improvement contract, and thereby concluded that Elm Sea was operating as a home improvement contractor. The hearing was devoid of a single fact witness as to what work was actually performed, or by whom. While hearing officers of municipal agencies, and the final determinations which follow, are entitled to a degree of deference, and Courts are not authorized to substitute their judgment for that of legislatively created agencies, the determination cannot stand if it is not based on prima facie evidence of the alleged violation.⁹

Dickson v. Bonistall involved a Westchester ordinance similar to Nassau's. It provided in part that "(n)o person shall maintain, conduct, advertise, operate or engage in a home improvement business within the County of Westchester or hold himself or herself out as being able to do so, unless such a person is licensed pursuant to this article."¹⁰ The plaintiff agreed to pay the defendant a fee amounting to 15% of all sums due to all sub-contractors for the supervision of a construction project on the plaintiff's residence. The plaintiffs alleged a breach of contract by defendant, to which the defendant counterclaimed for the unpaid 15% fee. The plaintiff replied that the defendant was unlicensed, and therefore unable to enforce his claim for non-payment.

The defendant took the position that he was not acting as a contractor, but as a supervisor, and therefore not subject to the licensing requirement. Under these circumstances, the Second Department concluded that the plaintiff failed to make out a prima facie case that the defendant was engaged in a home improvement business as defined in the ordinance, and affirmed the denial of the plaintiff's motion to dismiss the counterclaims.

The circumstances of this case are not different than those in *Dickson*. There has been no showing that Elm Street was a home improvement contractor, or held itself out to be. There was further no evidence that Elm Street undertook to perform any work as recited on the punch list. There is no rational basis for the conclusion of the Hearing Officer.

Assume, for example, that the Seller was not a corporation, but Mr. and Mrs. Smith. In

⁹ *Dickson v. Bonistall*, 19 AD.3d 640, 641 (2d Dept. 2005).

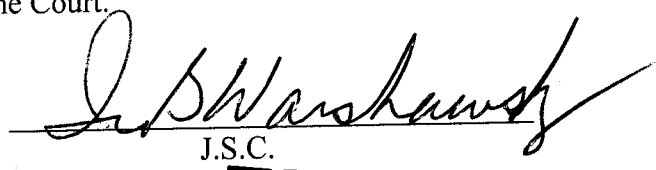
¹⁰ Administrative Code of the County of Westchester § 863.313.

their contract of sale with Mr. and Mrs. Jones, they entered into the usual representations that the “plumbing, heating, electrical and appliances would be in working order at the time of closing and the roof free from leaks.” As luck would have it, a hurricane strikes on the day before the closing, stripping the roof of shingles, and causing it to leak. At closing the following morning, the Sellers agree to arrange for the repair of the roof and for their attorney to hold \$5,000 in escrow to insure their performance. Following the determination of the Hearing Officer, they would be required to obtain a license from the Nassau County Department of Consumer Affairs to arrange for the roof repair on the home which they no longer own. This result is palpably ridiculous; but it is no more so than the result achieved in this matter.

The petition to vacate the determination of the Officer of Consumer Affairs and the imposition of a \$500 fine is vacated. The cross-motion to confirm the determination is denied.

This constitutes the Decision and Order of the Court.

Dated: June 1, 2009


J.S.C.

ENTERED

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